STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of P. S. PAYNE, Minor.

UNPUBLISHED
March 25, 2014

No. 316525
Wayne Circuit Court
Family Division
LC No. 03-425237-NA

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(f). We affirm.

Petitioner, the minor child's guardian, was appointed legal guardian in 2007. On October 30, 2012, for purposes of adoption, petitioner filed a petition to terminate respondent's parental rights under MCL 712A.19b(3)(f). The trial court clarified for the parties that petitioner had to prove that there had been no significant visitation or support from respondent since October 2010.

On appeal respondent first argues that the trial court was required to hold a trial to determine whether it had jurisdiction. Under MCL 712A.2(b)(5), the family division of the circuit court has jurisdiction over a child under age 18 who has a guardian under the Estates and Protected Individuals Code and whose parent, (1) "having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition," and (2) "having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected without good cause, to do so for 2 years or more."

Pursuant to testimony and judicial notice of court orders and findings, the trial court found by a preponderance of the evidence that the child came within the provisions of MCL 712A.2(b)(5). The trial court specifically found that the child had never lived with respondent, and respondent never provided regular or substantial support for her. Respondent testified that she had not paid child support for her daughter since 2007. The child's guardian testified that she received only one gift of donated items for the child in 2010. Respondent admitted that she had a household income of over $1,600 per month from her other children's social security income. She used this income to pay bills and her own tuition, but she did not spend money on items for the child.

The trial court also found that respondent failed to regularly visit, contact, or communicate with the child. During the two years before the filing of the petition, respondent attended only 13 visits and did not call or otherwise contact her daughter. Although respondent claimed she failed to regularly and consistently visit her child because she was intimidated by the guardian, lacked gas money for transportation, and lost the guardian's phone number, there is no real evidence that she did not have the ability to visit or contact her daughter. The guardian maintained the same cell phone number throughout her entire guardianship, her address was on file with the court, and she never denied respondent access to her daughter.

Respondent last visited her daughter on July 5, 2011. The Department of Human Services terminated visits because respondent failed to appear for visits or cancel them in advance. There is no evidence that she tried to reschedule the visits, and it is unclear from the record why respondent failed to maintain contact with her daughter. This child has never been in respondent's care and custody, and respondent has only had minimal contact with the child in the past several years. Thus, contrary to respondent's claim, the trial court properly asserted jurisdiction under MCL 712A.2(b)(5).

Respondent also claims that the trial court denied her due process by failing to follow mandatory procedures such as informing her of her right to a trial before a judge and jury. Respondent did not raise this issue in the trial court. Unpreserved constitutional claims are reviewed for plain error that affected respondent's parental rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Child protective proceedings are civil matters, MCL 712A.1(2); *In re Brock*, 442 Mich 101, 107; 499 NW2d 752 (1993), and the Michigan Constitution provides that the right to a jury trial in a civil matter is waived unless demanded "by one of the parties in the manner prescribed by law," Const 1963, art 1, § 14. MCR 3.965(B)(7) provides that a respondent must be advised at the preliminary hearing "of the right to trial on the allegations in the petition and that the trial may be before a referee unless a demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912." In the adjudicative phase of child protective proceedings, a respondent has the right to a trial with a jury as fact-finder. MCR 3.911(A); *Brock*, 442 Mich at 108. Respondent correctly notes on appeal that the trial court did not advise her of the right to a judge or jury trial on the record. Since such notice is clearly required by court rule, MCR 3.965(B)(7), the trial court erred by failing to give the appropriate notice on the record.

Nevertheless, the right to a jury trial is waived by a party's failure to make a timely demand for jury trial. *In re Hubel*, 148 Mich App 696, 699; 384 NW2d 849 (1986). Respondent's participation in the proceedings without objection to the absence of a jury constituted withdrawal and abandonment of any right to a jury trial or to have the matter tried by a judge.[1] Respondent failed to object to the absence of a jury at any time during the

[1] Moreover, respondent had no right to a jury trial for the termination hearing. See MCR 3.911(A), MCR 3.977(A)(3); *Brock*, 442 Mich at 108.

jurisdictional trial or assert a request for a jury trial. Respondent was represented by counsel at all of her court appearances. Her attorney was, no doubt, aware of the options to have a judge preside and never requested one. Likewise, from the record, there is no reason to believe that respondent had wanted a judge or jury.

Waiver of trial by jury can be inferred by a party's conduct under the totality of the circumstances test. *Marshall Lasser, PC v George*, 252 Mich App 104, 108; 651 NW2d 158 (2002). Although this test must be applied with awareness of the importance of trial by jury, error cannot be harbored as an appellate parachute. *Id*. at 108-109. A party may not deem a course of action as proper at trial and submit on appeal that the lower court proceeding was improperly held. *Id*. at 109. In this case, respondent did not mention her jury request before the trial court and participated in the bench trial before a referee without objection. She could not remain silent and then attempt to overturn the results by raising the issue on appeal. See *Id*. Respondent waived her right to a judge and jury under the totality of the circumstances.

Moreover, despite a procedural irregularity, there is no reason to prolong this case by remanding to the circuit court again. Respondent was not prejudiced by the failure to conduct the hearing before a judge or without a jury, rather than before a referee. She does not contend that she had an unfair trial. Under these circumstances, any error in the trial court's failure to properly inform respondent of right to judge and jury was harmless. Where respondent has not shown that the error was "inconsistent with substantial justice," MCR 2.613(A); MCR 3.902(A), the error can be considered harmless. *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002). Thus, although the proceedings were imperfect, the child's best interests were ultimately served. Therefore, failure to inform respondent of her right to judge and jury in this case was not a plain error that affected her substantial rights.

Respondent also claims that the trial court was required to read the allegations in the petition. According to MCR 3.972(B)(2), the trial court was required to read the petition allegations unless respondent waived that right. Here, respondent has not shown a violation of her right to due process, nor has she shown that her substantial rights were affected by the trial court's failure to read the petition in its entirety or to ask respondent whether she waived its reading. Respondent received a copy of the petition in accordance with MCR 3.920, and the court's record shows that respondent had a copy of the petition in her possession at the pretrial hearing on November 29, 2012. Moreover, despite respondent's claim that the petition was not formally read, the record shows that the trial court reviewed the allegations in the petition on the record on January 15, 2013. She was therefore aware of the allegations listed therein. Thus, respondent's claim is without merit.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood